Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendments of Parts 32, 36, 61,	)	
64 and 69 of the Commission's Rules	)	RM-8221
to Establish and Implement Regulatory	)	
Procedures for Video Dialtone Service	)	

Comments of the

Fiber Optics Division

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Fiber Optics Division of the Telecommunications Industry Association ("TIA") submits these comments in response to the "Joint Petition for Rulemaking and Request for Establishment of a Joint Board" ("Joint Petition") filed by the Consumer Federation of America ("CFA") and the National Cable Television Association ("NCTA"), RM8221, on April 8, 1993. A pleading cycle was established by the Commission in a public notice released April 21, 1993.

Statement of Interest and Summary

The Telecommunications Industry Association is a membership organization representing over 500 manufacturers of equipment used by all participants in the telecommunications industry. The more than 135 members of TIA's Fiber Optics Division make fiber optics systems and components. TIA companies also manufacture transmission equipment and earth stations used by the broadcasting, cable television and satellite video distribution industries.

TIA was an active participant in the Commission's video dialtone ("VDT") rulemaking proceedings, CC Docket Number 87-266. A strong proponent of video dialtone in the earlier proceedings, TIA urged the Commission to adopt rules that would not unduly obstruct or discourage the deployment of optical fiber and other technologies necessary for the implementation of video dialtone.

Summary. Despite some relaxation of the cable TV-telephone crossownership rules in the video dialtone Second Report and Order of July, 1992, the regulatory climate remains uncertain for local exchange company (LEC) delivery of video signals and services. Only four LEC video dialtone applications have been filed, and just one granted. The Joint Petition exacerbates this uncertainty and inhibits technological development by putting the cart before the horse: It asks for rules in advance of real-world experience.

The Joint Petition is premature and should be dismissed for several reasons. First, it asks for video dialtone-specific rules which, as recently as 10 months ago, the Commission declined to adopt. Second, it largely replicates the pending requests for additional rulemaking contained in numerous petitions for reconsideration of that 10-month-old decision. Third, in seeking an end to FCC consideration of current and future video dialtone Section 214 applications until new video-specific rules are enacted, the Joint Petition would abort the crucial development of practical information about what kinds of services the new systems will call forth and how the networks will actually be used.

Finally, and in relation to this need for empirical data, the Joint Petition is so vague as to the content of new cost allocation, jurisdictional separation and accounting regulations that it fails to give the adequate public notice required of rulemaking under the Administrative Procedure Act. Should the Commission nevertheless determine to open a proceeding, despite the manifest prematurity of such an action, it must continue to dispose of pending and future video dialtone

applications, subject to such consumer safeguards -- beyond existing rules -- as may be called for in the particular situation.

Video Dialtone Technology Is Ready For Immediate Deployment.

In its comments in Docket No. 87-266, TIA demonstrated that video dialtone technology is here today and ready for immediate deployment. Seven TIA vendors were profiled along with their broadband systems which are already being deployed on a trial basis by many LECs. One of these, BroadBand Technologies, Inc. (BBT), has contributed its Fiber Loop Access (FLX) system to Bell Atlantic video dialtone proposals pending at the FCC for service to some 50,000 residents in Morris County and Dover Township, New Jersey.

With the cooperation of US WEST, TIA was able to show -- in terms of an actual LEC request for fiber deployment proposals -- the special cost-effectiveness of optical loop technologies in rural areas. Since then, US WEST has announced its plans to deploy a fiber broadband network integrating video dialtone capabilities across its entire 14-state area by 2025, with perhaps 30 per cent of access lines upgraded by the year 2000. The LEC estimates it can accomplish this deployment without increasing its current $2.4 billion capital budget.[1]

Rulemaking Is Not Justified by Experience with Video Dialtone to Date.

In its *Second Report and Order* in Docket 87-266, the Commission deferred additional rulemaking on jurisdictional separations, cost allocation, cost accounting, access charges and other consumer safeguards for a period of three

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[1] *Telecommunications Reports*, February 8, 1993, 6-8; *Communications Daily*, February 5, 1993, 1-2.

years.[2] It found that "the concerns of potential discriminatory conduct and improper cross-subsidization are similar for common carrier services, whether voice, data, or video" and that "our existing safeguards with respect to nonregulated services are sufficient at this time to protect against cross-subsidization concerns identified in the record." *Id.* at 5828.

The agency determined that it could address these issues as they rose in the context of Section 214 applications for authorization to construct video dialtone facilities.[3] Petitioners NCTA/CFA argue "that this ad hoc approach will not work."[4] The experience with VDT to date does not support this conclusion.

Only four video dialtone applications have been filed. In the only one yet approved, the Commission warned the applicant, C&P Telephone, that no costs of its video dialtone trial "shall appear in any C&P rate base or as a regulated expense" without prior agency approval. Other conditions on the Section 214 grant called for detailed reports on "percentage of use of the local loop for video and telephone services" in order to provide "valuable information regarding the

The Commission, in its *Second Report and Order*, concluded that existing safeguards were sufficient.[6] It also acknowledged, however, that these protective rules may have to be more carefully tailored to video dialtone.[7] The need for more particularized safeguards was to be determined during the Section 214 certification process. The Commission agreed to revisit the matter of additional safeguards within three years.[8] The implication that experience gained in Section 214 certifications would help in evaluating the usefulness of further protections was

Petitioners here -- because to do so would be premature given the evolving nature of VDT.[11]

The Commission expressly stated that "While it is true that this [existing] regulatory scheme was not developed with video distribution in mind, no party has demonstrated that it should be changed at this time for video dialtone." 7 FCC.Rcd at 5828. Unless the Petitioners or commenters present new evidence justifying an immediate need for additional VDT rules, the Commission should adhere to the procedures established in its *Second Report and Order*. These procedures allow for conditioning Section 214 grants according to the consumer safeguards best

Not only should the Commission continue to dispose of VDT applications, but it should also welcome and encourage the continued filing of these applications. This would allow the Commission to continue to accumulate empirical evidence that will be of enormous value in determining what, if any, additional safeguards are needed.

To delay the deployment of video dialtone technology would not be in the public interest. As illustrated by the Bell Atlantic application already granted and its three pending applications, as well as the US West plans discussed above, LECs are prepared to move forward with video dialtone today. To hold these applications in abeyance and to decline to accept new applications pending a rulemaking would directly retard the deployment of video dialtone, thereby depriving the public of many potentially new services for a year or more.

A Premature Rulemaking Would Only
Increase Harmful Regulatory Uncertainty,
Thereby Further Delaying Broadband Deployment.

In the *Second Report and Order*, the Commission quoted the comments of Ameritech stating that the FCC has consistently found its current safeguards adequate and that if it were to impose safeguards more onerous than those which presently exist, business development could be discouraged.[13] This cautionary note, along with the suggestion of Rochester Telephone that the Commission address potential safeguard modifications in the context of specific service proposals, appears to have provided the basis for the Commission's decision to address additional safeguards in the context of specific section 214 applications.[14]

Despite the Commission's laudable preference for a context of specific facts, regulatory uncertainty remains a significant deterrent to the deployment of video

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[13] *Id.* at 5824.

[14] *Id.*

dialtone.[15] Of course, petitions for reconsideration and review of the video dialtone decision were probably unavoidable. Their effects, however, need not and should not be compounded by opening a rulemaking which largely replicates requests already made in numerous reconsideration petitions, including those filed by each of the Joint Petitioners.[16]

This is particularly true where, as here, Petitioners have failed to make proposals specific enough to be the foundation for rulemaking under the notice requirements of the Administrative Procedure Act (APA) at 5 U.S.C.§553(c).[17] Their "fallback" alternative to a video dialtone freeze (Joint Petition, 5) is to make any future video dialtone grants subject to the outcome of the rules they wish to have adopted. But this is unsatisfactory where the applicants are without specific proposals on which to base predictions of rulemaking outcomes.

The Commission has regularly conditioned certifications, licenses, and other grants on the outcome of pending rulemakings. For example, in *International Relay, Inc.*, 97 F.C.C.2d 327, 336 (1984), the Commission retained jurisdiction to modify certain earth station licenses pending the outcome of a rulemaking to adopt a new international earth station ownership policy. In so doing, the Commission

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[15] Ad hoc conditioning of video dialtone grants, while preferable to rulemaking at this early stage, places a large responsibility on the Commission to make decisions which are seen as consistent, despite the great variety of proposals. Otherwise, grants or denials lacking common threads of policy and principle will increase harmful regulatory uncertainty.

[16] *See, e.g.*, Petition for Reconsideration of NCTA (filed Oct. 9, 1992); Petition for Reconsideration of CFA and Center for Media Education (filed Oct. 9, 1992); Petition of The National Association of Regulatory Utility Commissioners (filed Oct. 9, 1992); Petition for Reconsideration of The Pennsylvania Public Utility Commission (filed Oct. 9, 1992). *See also*, at 47 C.F.R.§1.401(e), the provision for dismissal of petitions which are "moot, premature [or] repetitive . . ."

[17] *See Chemical Waste Management, Inc. v. EPA*, 976 F.2d 2, 79-80 (D.C.Cir. 1992) ("In general, to meet section 553, an agency must 'provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.'") Although an agency may satisfy the notice standard of Section 553 by describing the subject matter of the proposed rule, it is rare for it to do so. "When an agency realizes some problem exists but does not yet have sufficient information to write a full-blown proposed rule, it generally refrains from publishing a proposed rule and instead publishes . . . *Notice of Inquiry* in which it writes a broad description of the area and issues for which it may write some kind of rule . . . ." William Fox, *Understanding Administrative Law* (Matthew Bender Co.: New York, 1986) p. 126. The FCC rule on the subject is at 47 C.F.R.§1.401(c).

observed that it "has previously found it necessary to condition the grant of applications on the outcome of a rulemaking proceeding." *Id.* at n. 15 (citations omitted). The Commission expressly concluded that it was unnecessary to defer applications to construct and operate IBS stations until the outcome of the rulemaking. Significantly, however, the shape of the coming regulations was known with more certainty.[18]

As noted earlier, Petitioners have not proposed specific rules for adoption. Thus, quite apart from the APA problem, there is little guidance for VDT applicants as to what shape such rules might take. To issue an NPRM as Petitioners request would create greater regulatory uncertainty and further delay deployment of broadband technology via VDT.

If the Commission determines to open a proceeding, only a first stage is warranted now and the outcome is not predictable enough to be a basis for conditioning VDT grants.

For all the reasons discussed above, the Commission should continue on its minimum three-year course of granting video dialtone applications subject to tailored consumer safeguards, before determining whether to proceed to rulemaking. Should the agency nevertheless wish to begin a process of more generic guidance on allocating and accounting for video dialtone revenues and expenses, it should open with a Notice of Inquiry.[19] Properly structured, such a preliminary proceeding should not disturb disposition of pending and future video

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[18] *See, U.S. earth stations that operate with the INTELSAT global communications satellite system,* Notice of Proposed Rulemaking, 97 FCC.2d 444 (This NPRM was instituted to implement a change in policy as opposed to a specific rule. The Commission did, however, proffer specific policy proposals in the NPRM.).

[19] In fact, such a two-stage approach was followed early in the video dialtone proceeding, where an NOI preceded an initial NPRM. *See* Notice of Inquiry, 2 FCC.Rcd 5092 (1987) and Notice of Proposed Rulemaking, 3 FCC.Rcd. 5849 (1988). Since then, of course, two more refinements of rulemaking proposals have been proferred in the Further Notice of Proposed Rulemaking and Second Further Notice of Inquiry, 7 FCC.Rcd 300 (1991), and the Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC.Rcd 5781 (1992). In each refinement, the aim was to put regulated entities and the general public on adequate notice of what the Commission had in mind.

dialtone applications, but could become a repository for information gleaned from these new projects.

As an NOI, in TIA's view, the proceeding would not be sufficiently directive to serve as a basis for conditioning VDT grants on the outcome. During the pendency of the NOI, instead, the Commission should rely on the ad hoc consumer safeguards best suited to each application. Only at the stage of a formal and specific NPRM, following on the NOI, would possible generic outcomes be sufficiently predictable to serve as a basis for subjecting VDT grants to the rulemaking contingencies.

Conclusion

The Joint Petition is premature and should be dismissed. The Commission should continue on its course of granting individual Section 214 applications. If any generic proceeding is opened at all, only a Notice of Inquiry can be justified at this time.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that copies of the foregoing Comments of the Fiber Optics Division, Telecommunications Industry Association, were served by hand or by first class mail, postage prepaid, on this 21st day of May, 1993, upon the following persons:

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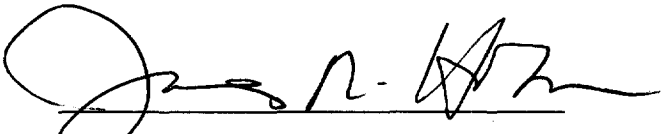

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